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No. 90-382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

VILLAGE OF MILFORD,

Petitioner,

v.

PROFESSIONAL LAWN CARE ASSOCIATION,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner Village of Milford urges the Court to grant the petition in this case, along with the petition in *Wisconsin Public Intervenor v. Mortier*, No. 89-1905. The United States urges the Court to hear the *Wisconsin Public Intervenor* case because it concludes that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 *et seq.*, does not preempt the local pesticide regulation at issue in that case. However, because the reasoning that it used to reach that result would also lead to upholding the Village of Milford's public notice ordinance, the United States suggests that the Court hold this case pending the outcome of the *Wisconsin Public Intervenor* case. Br. at 16 n.16. We disagree.

This Court should hear this case along with the *Wisconsin*

Public Intervenor case for two reasons. First, while the Village of Milford shares the United States' view that FIFRA does not preempt all local regulation of pesticide use, the Court may reach a different conclusion. Indeed, twice in its brief, the United States states that "[o]n the merits, the issue is close," Br. at 3, and "the preemption issue is not without difficulty." *Id.* at 15. Thus, this Court may well disagree with the United States on this "close" question, which leads to the second reason why the Court should hear both cases together.

The two cases raise identical legal questions only if the Court decides either (1) that FIFRA preempts all local pesticide regulation of any kind, in which case it would affirm the judgments in both cases below, or (2) that FIFRA preempts virtually no local regulation, in which case it would reverse both judgments. However, the Court could, for reasons set forth in our petition, take an intermediate position and hold that FIFRA preempts some, but not all, local regulation. In that case, the Court must determine whether the particular local ordinances can co-exist with federal regulation.

Indeed, the United States recognizes that, if FIFRA does not expressly preempt all local pesticide regulation, then "local government ordinances are subject to the usual preemption analysis given to such local ordinances." Br. at 8. However, the Court cannot apply the "usual preemption analysis" in a vacuum; rather, it must determine whether the particular regulation interferes or conflicts with the federal regulatory scheme.

Applying this analysis, the Court might well reach different conclusions with respect to the two local regulations because they are at opposite ends of the spectrum — one essentially reaching regulatory judgments at odds with the Environmental Protection Agency's and the other regulating public notice, a matter wholly outside of FIFRA's reach. Thus, the Court

might decide that the Wisconsin regulation is preempted, in whole or in part, because it enables the local government to revisit many of the scientific and technical judgments made by EPA under FIFRA. However, that determination does not preclude a ruling that FIFRA permits a local public notice ordinance, like Milford's, since that type of requirement presents no interference or conflict with federal regulation.

While the United States' conclusion that local permitting systems do not undermine the federal scheme would presumably allow local notification ordinances like that of the Village of Milford, a decision that FIFRA preempts the more intrusive local regulation may have little bearing on more modest local notice measures. In order to resolve the local preemption questions under FIFRA in a reasoned and complete manner, and to promote judicial economy, the Court should have both cases before it when it decides the extent to which FIFRA preempts local regulation.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the Court should grant the petition for a writ of certiorari and hear this case along with *Wisconsin Public Intervenor*.

Respectfully submitted,

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